Southwest Merchandising Corporation d/b/a Handy Andy, Inc. *and* United Food and Commercial Workers International Union, AFL–CIO, Local Union No. 171. Case 23–CA–9311

November 26, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issue raised in this proceeding on remand from the United States Court of Appeals for the District of Columbia Circuit is whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire 24 individuals who had participated in a strike against the Company's prior owner.[1]

The facts, as summarized by the court, are as follows:[2]

> In 198l Handy Andy, a corporation operating retail grocery stores, filed for bankruptcy. In early 1982 the bankruptcy court entered an order nullifying the collective bargaining agreement between Handy Andy and its meat department employees, who were at the time represented by Local 171 of the United Food and Commercial Workers International Union. Soon afterward some of the meat department employees began an economic strike. In August, the Employer contends without contradiction, Handy Andy lawfully withdrew recognition of the Union after a poll of its employees showed that a majority no longer wanted the Union to represent them. By the end of 1982, 24 strikers had unconditionally offered to return to work, but Handy Andy rejected their offers on the ground that their position had been eliminated or filled by permanent replacements. The Union notified the Employer that if it bought Handy Andy's grocery stores, then the Union would demand that it hire Handy Andy's striking meat department employees.
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> On January 31, 1983, Handy Andy ceased operations and terminated all of its employees. The next day the Employer purchased the grocery stores and hired some of Handy Andy's management. The news media reported that the transaction had taken place and that the Employer would be accepting job applications, but they did not say where or when, and the Employer apparently made no attempt to publicize the information.
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> The stores remained closed on February 2 so that employment applications could be taken there. According to the Employer, management generally selected employees that night from among those who had submitted applications that day. Some of those hired, however, had not submitted applications; instead, they were contacted personally by a store manager on February 2 or subsequently and told to report to work. The Employer contends that although some grocery department employees were hired through this informal process, every meat department employee that it hired had filed an application on February 2 and was selected upon the basis of that application. The record contains no evidence directly supporting or refuting this contention.
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> On February 3, the Employer reopened the stores for business. Of approximately 97 employed in the meat department immediately before Handy Andy sold the stores, the Employer had hired 77. None of the former strikers had been hired.
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> According to testimony credited by the Administrative Law Judge, six former strikers had attempted on February 2 to apply at one or another of the Employer's stores with an identified supervisor, as did seven others later that month. Eight more strikers testified that they attempted to apply on or after February 2, but they failed to establish that they spoke to a supervisor. The testimony of two other strikers who claimed to have tried to apply was discredited, and one striker said that she did not try to apply because she thought that Handy Andy's earlier rejection of her unconditional offer to return to work in 1982 indicated that ''they weren't going to hire [her] anyway.''
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> When they went to the stores to apply for work, most of the former strikers identified themselves as such, some before and some after they had been told that no positions were available. All but three were told that the meat department positions were filled and were refused applications. One of the Employer's supervisors testified that the two former strikers who managed to apply in

[1] On September 29, 1989, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found that the Respondent violated Sec. 8(a)(3) and (1) as specified above.

Subsequently, the Respondent filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's Order, and the Board filed a cross-petition for enforcement of its Order. Thereafter, in an opinion dated September 13, 1991, the court remanded the case for further proceedings consistent with the court's opinion. *Southwest Merchandising Corp. v. NLRB*, 943 F.2d 1354 (D.C. Cir. 1991).

By letter dated January 17, 1992, the Board notified the parties in this proceeding that it had decided to accept the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion.

On February 27, 1992, the Respondent filed a statement of position. On February 29, 1992, the General Counsel also filed a statement of position.

[2] *Southwest Merchandising Corp. v. NLRB*, supra at 1355–1356. Our original decision, and the judge's decision attached thereto provide a more detailed description of the pertinent facts.

February were rejected because of their poor performance when employed by Handy Andy. The ALJ rejected this claim because it was vague about the nature of the problem and about when it had occurred and because it was unsupported by any other evidence.

During the next seven months, 60 vacancies in the meat department were filled, but no former striker was hired. A supervisor testified that at that time the Employer had a practice of promoting part-time store staff to full-time meat department openings, but the company offered no evidence to document this practice.

In addition to these facts recited by the court, we note that the Respondent had an announced policy of accepting applications from anyone who filed, irrespective of when the application was filed.[3]

As noted above, the Board affirmed the judge's findings and conclusion that the Respondent had discriminatorily refused to hire the former strikers in violation of Section 8(a)(3) and (1).

In its opinion, the court found that it was ''unable adequately to review the Board's decision as a result of (1) the ambiguity surrounding its legal theory and the relationship of that theory to the facts found, (2) the absence of any finding as to whether any meat department workers were given notice of the application procedures, and (3) the Board's failure to consider obvious alternative explanations for the Employer's hiring as and whom it did.''[4] The court, therefore, remanded this matter to the Board for clarification of these points. The court also questioned the remedy ordered by the Board and directed the Board on remand to clarify ''what must be shown to entitle a non-applicant (or an applicant who did not fully and timely comply with hiring procedures) to a remedy for discriminatory hiring practices, and explain how that showing has been made with respect to each former striker to whom it grants relief.''[5]

We have reconsidered our original decision and adhere to it: we find that the Respondent violated Section 8(a)(3) and (1) by engaging in a sham ''open to the public'' application process, which was intended to, and did, accomplish these relevant results: 100 percent of the Respondent's new meat department employees had worked for the predecessor, while not 1 of the 24 employees who had struck the predecessor's meat department was hired.[6] Our theory of this violation of Section 8(a)(3) and (1) is that, despite the fact that it wanted to build a meat department work force composed as much as possible from former employees of the predecessor, the Respondent decided to set aside 1 day to solicit applications from the public and to choose its initial work force from among the individuals who filed an application that day. Through this procedure, with its seemingly neutral requirement of a job application filled out on February 2, the Respondent could ensure that no striker would be hired simply by preventing the strikers from filling out applications. In this way, the strikers would not, technically speaking, qualify for consideration and the Respondent would appear justified in not hiring any of them. At the same time, the Respondent put together the work force it had already decided it desired: one composed almost entirely of the predecessor's former employees, but none of the former strikers. We further believe that the Respondent engaged in this conduct out of animus against the strikers for having engaged in the protected activity of striking.

Because the court has criticized us for overlooking ''obvious alternative explanation[s]'' for the fact that no strikers made it through the Respondent's application process, we shall approach the questions raised by the remand in the following way. We shall first consider and presume the truth of the evidence adduced by the Respondent and its arguments[7] in support of the lawfulness of its conduct, including the Respondent's stated criteria for its hires for the meat department and its witnesses' testimony about the meat department hiring process. If the Respondent's method of filling its meat department vacancies and its showing with respect to the events of its 1-day hiring drive bears a rational relationship, however remote, to its announced goals, we shall conclude that the Respondent has rebutted any prima facie case established by the General Counsel and we shall dismiss the complaint without examining the General Counsel's evidence. If, however, we find no ''obvious alternative explanations,'' or, in other words, no rational relationship between the Respondent's avowed goals and its procedure for achieving those goals, we shall examine the General Counsel's evidence to determine if, indeed, a prima facie case has been established. By examining the Respondent's case first, and assuming that all evidence presented by the Respondent is true, we shall ensure that no lawful motivations for the Respondent's chosen course of action will go unnoticed.[8] Further, in view

[3] Under that policy, if the application was for a position that had already been filled, the application was retained in company files for possible future hiring.

[4] Id. at 1361.

[5] Id. at 1362.

[6] The court appeared to view our decision as possibly based on the numerical results of the Respondent's hiring process. We are not relying only on the results of the hiring process, however; our analysis should demonstrate that we compare the Respondent's purported ends with the means chosen to achieve those ends in search of a lawful explanation of the Respondent's conduct.

[7] We shall, however, limit our examination to those arguments and business justifications actually placed before us by the Respondent.

[8] We recognize that this analysis reverses the usual *Wright Line* analysis. However, we are dealing with the case in light of the court's remand, rather than as a case for initial decision. Accord-

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of the questions raised by the court we have also reconsidered our original remedy. We continue to find that the appropriate remedy is reinstatement and backpay for each of these discriminatees.

Initially, we turn to the court's concern that our opinion in the underlying case was based on an ''unarticulated assumption that a successor has a special obligation to favor the employees of its predecessor, or at least to treat them all in the same way.''[9] In our earlier decision, we agreed with the judge that the Respondent is a successor to Handy Andy, Inc. As the court notes, however, we also stated, that, ''We . . . find it unnecessary to pass on his [the judge's] findings regarding the *Laidlaw* obligations of a successor to former economic strikers. . . .'' In so doing, we intended to make it clear that we were not passing on whether the Respondent had an obligation as a successor to favor the employees of the prior employer or to treat all these employees in the same way. Thus, although the economic strikers against Handy Andy had certain reinstatement rights, under *Laidlaw*, as to Handy Andy, we are not basing our conclusion on the proposition that they had such rights as to the successor to Handy Andy, Inc., i.e., the Respondent. Rather, we base our analysis and conclusions on the assumption that the Respondent was not obligated to extend *Laidlaw* rights to the strikers, and we look to the General Counsel to demonstrate that the Respondent's failure to hire any strikers was motivated by discriminatory intent. *Pepsi-Cola Bottling Co. of Topeka*, 227 NLRB 1959, 1959 fn. 2 (1977).

Thus, we are not confusing the Respondent's obligation to the strikers with those of the predecessor. We are concerned with only two aspects of the strikers' status: first, their status as former employees of the predecessor.[10] As such, if they applied for jobs with the Respondent, and the Respondent had decided, as was its right, to accord a preference to the predecessor's terminated employees, then the Respondent could not deny that preference to the strikers solely on the basis that they had struck the predecessor.[11] Second, we are concerned with the strikers' status as statutory employees. If the Respondent decided, as again was its right, to treat the predecessor's employees the same as the general public, then the strikers had a right, as did any potential employee, to file an application and be considered for a job.

We now examine the evidence presented by the Respondent's witnesses in explanation of the events of February 2 and the following 7 months with respect to the meat department. It is undisputed that the Respondent knew of the strike against the predecessor's meat department. In addition, many of the predecessor's managers and supervisors, including George Tamaz and Carl Schroat, the predecessor's meat department manager and its vice president and general manager, respectively, continued in the same or similar positions with the Respondent after the sale. Both Tamaz and Schroat testified that they knew of the meat department strike and that they knew the identity of each striker.[12]

It is also uncontroverted that the Respondent knew that the economic strikers were interested in coming to work for it. The Union on November 29, 1982, had made an unconditional offer on behalf of the economic strikers to return to work for Handy Andy. The mailgram the Union sent that day was addressed to George Tamaz, vice president and personnel director for Handy Andy, who continued in that capacity for the Respondent. In addition, in the December 9 letter, described above, the Union informed the Respondent ''we are demanding that you employ bargaining unit employees or that you continue employment of any and all bargaining unit employees.''

The Respondent's witnesses testified as to the meat department's hiring procedures as follows. According to Tamaz and Schroat, on February 1 store managers were told to inform all employees that they were terminated, close the stores down, and set up signs and tables for accepting job applications the next day. The store managers were told to accept all applications and to bring them to the managers for processing at the end of the day.[13]

Schroat testified that no other notice of the hirings was given to meat department employees, except that news of the sale of the stores and the hiring appeared on television and in the papers; the court found that those reports gave no details of the hiring's time and place. Schroat testified further that he hired for the meat department from the applications received—77 employees from 100–150 applications, down 15 from

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ingly, we adopt this analysis to respond more precisely to the court's remand.

[9] Id. at 1360.

[10] We emphasize that reference to the 24 discriminatees here as ''strikers'' is purely for convenience, as their strike ended with their unconditional offer to return to work, communicated to Tamaz on November 29, 1982.

[11] The court has suggested that the Respondent may have been motivated by a preference for ''incumbent'' employees, or those still working in the predecessor's stores when they closed. As discussed below, the Respondent has never argued that it had that preference; it stated that it wanted employees with experience working for the predecessor, whose former employees fall into four groups: those at work when the stores were closed, or ''incumbents''; those on layoff; those who were, or who should have been, on a preferential rehire list; and those who had left or been discharged by Handy Andy. We find nothing in the Respondent's testimony or argument on which to base an inference that its use of the terms like ''former employees'' refers to only one of the above categories, especially where, as here, heavy layoffs had recently occurred. Again, the Respondent has not argued for such a meaning in its statement of position on remand.

[12] See Tr. at 68–69 (Tamaz) and 44, 455 (Schroat).

[13] Although, as noted above, the previous owner ceased operations on January 31, some managers and incumbent employees were not notified of the stores' closing until February 1.

the presale figure of 92. Schroat and his assistants knew the number of employees needed to staff the stores' meat sections and planned to man the stores at a minimum level[14] ''with the best people we could find, in the applications, best productive people,''[15] and ''knowing . . . the people we put back in there, we used the criteria of . . . how productive they were in the markets prior.'' Schroat further testified that an individual who had not worked for Handy Andy previously would have had little or no chance of getting a job through the application process, because ''[i]t just so happened that there was enough applications there of the people that I had already known that had been previously employed by us.''[16] Schroat's testimony did not indicate that all 77 hires were ''incumbents''—employees at work in the predecessor's stores when it closed. He did, however, testify that the last months of the predecessor's operations were marked by heavy layoffs, so, presumably, some meat department employees were laid off. Schroat also testified that some of the strikers were good employment prospects, with good production records with the predecessor.[17]

With respect to the court's instruction that we consider nondiscriminatory reasons why the Respondent might have preferred ''incumbents'' or employees working on the day the predecessor ceased business, we do not find it possible to infer, as the court suggests, that the Respondent's actions betrayed a ''preference for incumbents.'' The Respondent's brief to the Board avers that experience with the predecessor—and not employment on the day the predecessor was closed—was the prerequisite for employment with the Respondent's meat department. The Respondent has never argued that it had a preference for those at work on the predecessor's last day; only that its criteria were *previous employment with the predecessor*, a credential each striker possessed, *and a good record*, a credential many of the strikers possessed. In its brief, the Respondent described its standards: ''[i]n reviewing those applications on the evening of February 2, and in determining who was a 'good prospect,''' Schroat, Hurla, and Keller relied heavily on their ''previous experience with former employees of the Debtor-in-Possession because their work habits, skills and productivity were already a known factor.''

The Respondent concedes that three strikers sought employment on February 2 and were turned away, in some cases along with other prospective applicants who were also waiting to apply. Paradoxically, the Respondent does not aver that its public application process was a failure, or that individuals who might well have been qualified to work in its stores, perhaps even more qualified than some of those who were chosen, were unable to submit applications. Instead, the Respondent emphasized both in testimony and in its brief that applications were accepted and that meat market employees were chosen from those who filled out applications, and that the meat department got exactly the type of individuals it wanted: former employees with record of productive employment with the predecessor.[18] The strikers who testified that they were refused applications provide the only hint that anyone was turned away; under the Respondent's view of the facts, everyone who sought to apply was given an application and that application was screened and considered with all the others. This view of the facts appears inconsistent with the admission that three strikers were flatly turned away when they attempted to apply and the credited evidence that still others were turned away.

If the only prerequisites for employment in the Respondent's meat department were prior employment and a good record with the predecessor, as the Respondent stated in its brief and its witnesses testified, why did the Respondent invite the public to fill out applications only to have them summarily rejected by Schroat and his assistants? The Respondent's witnesses do not explain; they do not claim credit for devising the hiring scheme. The answer, we believe, lies in the Respondent's argument that it

> had the lawful right to consider only applicants who had submitted an individual application for employment. This was a non-discriminatory and uniform requirement of all applicants, including the former employees of the Debtor-in-Possession. Under the circumstances, requiring the strikers to

[14] Although the expansion of the meat department after the stores reopened (from 77 on February 2 to 115 on October 10, 1984, the date Schroat testified) bears out testimony as to the low staffing level on February 2, this low level was apparently considerably higher in some cases than the employment levels immediately before the sale. According to Bob Simmons, manager of store 22, 6 employees were working in the store when it closed, while on the day the stores reopened, approximately 50 people for the store's grocery department alone had been hired out of the 200 who had submitted applications.

[15] Tr. at 426.

[16] Tr. at 472.

[17] Tr. at 472.

[18] Thus, our effort to find an explanation for the Respondent's conduct consonant with a lawful intent is stymied by the Respondent's failure to cast the facts of the record into a light that would reveal a lawful intent. The Respondent could have shown, for example, that its application process was swamped and that consequently no consideration could be given to any unknown applicant, or that after an early hour no more applications were available at certain stores, or that it contacted employees in the meat department who were currently working, as opposed to those on layoff or on the preferential hiring list, to inform them that they should apply for the available jobs. However, there is absolutely no basis in the record for making any of these findings as the Respondent has not argued them and has, in fact, stressed evidence that tends to indicate that the above inferences would be false.

submit individual applications cannot serve as evidence of any discriminatory intent.

This argument would be sufficient to explain the Respondent's course of action both legally and practically if setting up a 1-day public application process and requiring prospective employees for at least one department to fill out an application on that day, without providing any advance notice to any group, including currently working employees, was rationally related to the Respondent's stated goals for its meat department hiring. But the application process was thoroughly inconsistent with the Respondent's declared standards: previous experience with the predecessor and a good record. Further, under the Respondent's system, the applications Schroat reviewed offered no assurance that all former employees, or even all ''incumbent'' employees who wanted jobs with the Respondent applied for the jobs or that the Respondent was getting the most experienced and best qualified employees, as Tamaz and Schroat both testified that employees from the meat department received no advance notice of the February 2 process. Thus, not all the predecessor's former employees—even those at work on the last day—could have known of the 1-day application period. For the general public, of course, the application procedure was an exercise in futility.

Thus, we cannot conclude that the application procedure, at least as far as the meat department is concerned, bore a rational relationship to the Respondent's stated goals: in fact, it is difficult to conceive of a procedure less likely to achieve the results the Respondent sought. We must look, then, as the court has instructed, for other explanations for the Respondent's course of action. The court has suggested some reasons why the Respondent might have preferred ''incumbent'' employees, but we cannot conclude that any of them corresponds to the reasons for the application procedure, because the Respondent has not asserted to us, even in its statement of position to the Board *after* the court's suggestions, that it considered any reason mentioned by the court when the hiring process occurred. Further, the court's proffered reasons go only to the *makeup* of the work force ultimately chosen, not to the *process* for choosing it.

The Respondent's only explanation for the process is quoted above: it had the right to require applications, and, in its view, no one could find that the application requirement, applied to the strikers, was discriminatory. To add other rationale to the Respondent's case would be to second-guess its judgment, and we shall refrain from that.

Our examination of evidence propounded by the Respondent leads inexorably to the following inferences: first, that the Respondent could not have achieved its hiring goals without according the predecessor's terminated employees special consideration in putting together its work force, and second, that it denied the strikers this consideration based on their protected activity.[19] We conclude, then, based on the Respondent's evidence as to the design and function of the February 2 hiring process, that no rational connection between goal and procedure exists, that the Respondent had no legitimate business justification for its public hiring process with respect to the meat department, and that the public hiring procedure is so antithetical to the Respondent's stated goals that we can only conclude that, at least with respect to the meat department, the procedure was a sham intended to prevent or discourage the filing of applications by the strikers. In this way, it could avoid being put in the position of having to either hire them or reject them and run the risk of being accused of discriminating against them for their striker activities.

We now turn from the Respondent's evidence with respect to its hiring procedure to the evidence adduced by the General Counsel in support of allegations that the hiring process discriminated against the strikers.

As the court notes, it is well-established that an employer which declines to hire a person because of his or her union membership or union activity violates Section 8(a)(3) and (1) of the Act. As the court stated, ''In order to establish liability for such discriminatory hiring, the General Counsel must make a prima facie showing sufficient to support an inference that the employees' participation in the protected conduct (here, participation in a strike) was a 'motivating factor' in the employer's decision. The burden then shifts to the employer to demonstrate that it would have taken the same action even if the employees had not engaged in the protected conduct.''[20] According to the credited testimony, six of the former strikers attempted to apply with supervisors on February 2, the day the Respondent closed the stores with the stated intention of taking applications from everyone. Only one, Frankie Danmon, was successful in actually filing an application.

All five others, Irene Ponce, Beatrice Arredondo, Pete Ruiz, Rebecca Castillo, and Rose Polk, were turned away by the Respondent's supervisors. Polk sought to apply early at store 3 between 10 or 10:30 a.m. She talked to a man identified to her as the store

[19] Moreover, even if the above inferences are rejected, and the court finds that the Respondent's invitation to the public to apply for jobs with the new Handy Andy was not a sham, the evidence submitted by the General Counsel demonstrates, as will be seen below, that every striker who tried to participate in that public event was denied the opportunity accorded the general public of submitting an application and being considered for a job.

[20] See *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), in which the Supreme Court endorsed the Board's test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for determining if a discharge or other disciplinary act is motivated by an employee's protected activity.

manager and identified herself as a striker. Despite the fact, according to the Respondent, that no hiring decisions were made for the meat department until that evening, Polk was told that the Respondent was not taking any more applications. Ponce went to store 26 and spoke with Laubach whom she heard was the manager. Ponce asked Laubach for an application, explaining that she was a striker applying for a job. Laubach told her he was not giving out applications for the meat department. Arredondo went to store 11. While Arredondo was waiting in line, the store's assistant manager, Tony Garcia, came and told everyone that the Respondent was out of applications. Arredondo testified that Garcia said to her, ''oh you're here, Beatrice, in line.'' Arredondo replied ''yeah, I want a application.'' Garcia replied ''we're out of applications.'' Arredondo then left. Ruiz went to store 9 and spoke to a man who appeared to be in charge. Ruiz recalled that the man was handing out applications while he was waiting. When Ruiz asked for an application he was told that ''they were not giving out no more applications.'' Castillo went to store 41. She talked to a man whom she identified by his badge as the assistant manager. Castillo identified herself as a striker and stated that she wanted an application for the meat market. The man told Castillo that he was not taking any more applications. With the possible exception of those who happened to be in line with Arredondo, there was no evidence that anyone other than the strikers were prevented from filing applications.[21]

Further evidence supporting the inference that the Respondent's motive was to keep from having to hire former strikers is the experience of Frankie Danmon, the only former striker who was able to file an application on February 2. As we found in our earlier decision, the Respondent simply refused for pretextual reasons to hire him.[22]

The pattern continued with the former strikers who attempted to apply after February 2. Seven former strikers (Alice Arriaga, Edward Martinez, Rose Mary Burk, Onelia Heredia, Allen Love, Henry Perez, and Joe Huerta) spoke with a supervisor or an individual who appeared to be a supervisor. Five of the seven (Arriaga, Burk, Heredia, Martinez, and Love) were told either that ''the jobs were filled,'' ''there were no openings,'' ''or something similar.'' Although the Respondent has a policy of maintaining applications on file for future vacancies, the Respondent did not inform any of the five that procedure was available to them. A sixth employee, Henry Perez, was simply told that there were no application forms available.[23]

Of the seven, only Joe Huerta was permitted to file an application on his initial attempt. As found in our earlier decision, Huerta's application was considered and rejected for pretextual reasons. Subsequently, Arriaga on her second attempt in August 1983 was able to file an application. Arriaga has not been contacted for employment by the Respondent.[24]

Between February 2, 1984, and the hearing date, 7 months later, the Respondent filled 60 vacancies in the meat department. It did not hire any of the former strikers. The Respondent contends that ''many'' of these positions were filled by converting part-time employees under the predecessor to full-time status. The Respondent has not, however, offered any evidence to support that contention. Neither does it claim that all these positions were filled in this manner.

Based on the above, we find that the General Counsel has established a strong prima facie case to support the allegations that the Respondent discriminated against the strikers for their protected activity. Further, as we have already determined that the Respondent has established no plausible rationale for its course of action, we conclude that the Respondent has violated Section 8(a)(3) and (1).

It is quite evident from the facts recited above that the Respondent set up a hiring scheme designed to avoid having to consider the former strikers for hire and that it at all times adhered to that scheme. The scheme is most clearly established by the conduct of its supervisors on February 2 when they prevented five former strikers from filing applications, thereby avoiding the need to consider them, and refused to hire another for pretextual reasons. The Respondent's post-February 2 conduct also fits that pattern. Thus, the Respondent ignored its announced policy of taking applications from everyone and, with rare exception, refused to take applications from former strikers who

[21] One and perhaps two former strikers were similarly turned away on February 2 by the nonsupervisory personnel. Former striker Rosa Moralez went to store 41, identified herself as a striker, and asked for an application. She was told that the store did not need anyone. Mary Alice Guzman applied at store 9 about February 2. She was told by the person at the window they were not hiring anyone. While these rejections are by nonsupervisors, they follow the pattern experienced by former strikers who spoke with supervisors. The Respondent acknowledged that applying at its office or courtesy window is the customary means of applying for a job at its stores.

[22] The court did not indicate that it had any reservations concerning this finding.

[23] Six other strikers (Alfred Canedo, Stella Alvaredo, Pauline Cabido, Fred Barbazo, Carlos Dimas, and Jose Lopez) sought to file applications after February 2. Although the evidence was insufficient to establish that any of the six spoke with a supervisor, they were subjected to the same pattern of conduct. Indeed, one of them (Cabido) was told outright albeit by a nonsupervisory grocery manager, that the Respondent would not hire him because he was an ex-striker and a union member. Two of them (Barbazo and Dimas) were told that the Respondent was not taking any more applications. Two others (Lopez and Cabido) were told there were no application forms or the Respondent was not handing out applications anymore. Alvaredo was told that the Respondent was not hiring.

[24] The court did not indicate that it had any reservation concerning this finding.

sought employment.[25] It also refused to hire Joe Huerta for pretextual reasons. Further, despite the fact that the strikers were experienced, and the Respondent's assertion that it desired an experienced work staff, none of the strikers was ever hired. (This includes Alice Arriaga from whom the Respondent did accept an application in August 1983.) Therefore, we reaffirm our finding that the Respondent sought to preclude the hire of the former strikers and that it set up and operated its hiring procedure in such a way as to insure that it did not need to do so.[26]

In our original decision, we relied on the fact that the Respondent called some employees to ask them to apply for jobs, but did not call any former strikers for this purpose and that the Respondent hired some employees without prior applications, but required all former strikers to file applications as a condition of being hired.

The court expressed reservations about our reliance on these facts. We find that the pertinent testimony is that the Respondent's witnesses did not themselves contact any meat department employees or know of any contact of meat department employees before the 1-day hiring process and we will not second-guess the judge by finding that either Schroat or Tamaz was untruthful. But the witnesses' knowledge of what happened on February 2 cannot encompass every action by every agent of the Respondent; therefore, we find that there is room, without discrediting the Respondent's witnesses, for inferring that the application procedure was, like the hiring procedure, weighted toward the predecessor's employees in some manner. We infer that some former employees of the predecessor's meat department were called by agents of the Respondent and told about the 1-day application procedure, urged to come into the stores and apply for the jobs, and that these calls explain why the 1-day hiring process resulted in a work force composed entirely of the predecessor's former employees but no strikers.

In any event, we wish to make it clear that, in our view, the discriminatory motive would be established even without reference to these factors.

Based on the above, we conclude that the Respondent sought to exclude the strikers from consideration. The court suggests that there might have been a legitimate reason for doing so, i.e., that, the predecessor's employees who were working at the time of the takeover had *recently* worked together and the supervisors were familiar with their work. However, the strikers were experienced workers and the supervisors were familiar with their work. Their work experience was reasonably recent, inasmuch as the strike began on April 24, 1982, and the hirings were in February 1983. In any event, certainly the strikers were preferable, in an experiential sense, to those who had never worked for the Respondent. As to these hires, there was *no* familiarity with their work.

The Respondent does not present any evidence that any of the former strikers would have been denied employment even if they had not engaged in the protected conduct. Therefore it has not met its burden under *Wright Line*, supra. Accordingly, we adhere to our finding that the Respondent violated Section 8(a)(3) and (1) by refusing to employ the former strikers.

Remaining for consideration are the concerns the court expressed about the Board's remedy ordering reinstatement of those employees who applied after February 2 and of the three employees who never filed applications for employment—Shirley Walker, Alice Arriaga, and Roger Wendel. We have carefully considered our proposed remedy in light of the court's comments. In particular, we have considered the court's comments with respect to a futility rationale and agree that while, as an objective matter, it would have been futile for employees to apply, there is little or nothing to demonstrate that was the reason that these former strikers did not apply or did not do so on February 2. We continue, however, to be of the view that the proper remedy is full reinstatement and backpay for all 24 employees.

With respect to those who applied but did so after February 2, we note that the Respondent hired 60 meat department employees after February 2. No striker was hired. With respect to those who never applied, we note that the Union had made a request for reinstatement for all strikers, and thus the Respondent knew that they all wanted to work for it. In addition, the Respondent's policy was to hire experienced employees. Finally, we note that the Respondent hired some employees in other departments without application. However, it failed to extend that privilege to strikers. In these circumstances, we find that, but for the Respondent's discriminatory plan, it would have hired strikers even if they did not apply. Finally, to the extent that there is doubt on this point, such doubts should be resolved against the wrongdoer whose other unlawful actions in the hiring process created uncertainty.

Therefore, we adhere to the previous remedy in our original decision ordering reinstatement and backpay commencing February 2, 1983.[27]

[25] As the court suggests, we find such inconsistency evinces antiunion animus. *Shattuck Denn Mining Corp. v NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[26] While we continue to rely on the actions of the supervisors as the primary evidence of discrimination, the actions of the nonsupervisors, as noted above, follow the same pattern and are consistent with the action of the Respondent's supervisors.

[27] Even were we to conclude, which we do not, that an attempt to file an application was required before a former striker could be considered a discriminatee, we would find that each discriminatee who made such an attempt was entitled to backpay from the date of the first new hire after they filed, or attempted to file, an application.

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 296 NLRB 1001 (1989), and orders that the Respondent, Southwest Merchandising Corporation d/b/a Handy Andy, Inc., shall take the action set forth in that Order.